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2
3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 Barbara DuBose,

7 Plaintiffs,

8 v.

9 Hilton Grand Vacations Club, LLC,

10 Defendant.

Case No. 2:24-cv-00648-GMN-DJA

Order

11 Before the Court is Defendant Hilton Grand Vacations Club, LLC's brief regarding
12 sanctions related to Plaintiff's failure to attend the Early Neutral Evaluation and the subsequent
13 show cause hearing before the Honorable Magistrate Judge Maximiliano D. Couvillier (ECF No.
14 36), Defendant's motion to extend time (ECF No. 38), and Defendant's motion for sanctions
15 regarding Plaintiff's failure to respond to discovery requests (ECF No. 39).¹ Plaintiff has not
16 responded to any of these filings. Because the Court finds that Defendant has shown good cause
17 for extending discovery in this matter, the Court grants Defendant's motion to extend time. (ECF
18 No. 38). Because the Court finds that sanctions are warranted, but that there are lesser sanctions
19 than dismissal available at this stage, the Court grants in part and denies in part Defendant's
20 motion for sanctions and requests for sanctions related to the Early Neutral Evaluation. (ECF
21 Nos. 36, 39).

22 **I. Background.**

23 This is an employment discrimination case arising out of Plaintiff's employment with
24 Defendant between September 16, 2021 and October 1, 2022. (ECF No. 1-3 at 5-6). Defendant
25

26 ¹ Because Defendant has filed both a brief regarding sanctions related to the Early Neutral
27 Evaluation (ECF No. 36) and a motion for sanctions related to discovery (ECF No. 39), Judge
28 Couvillier has referred the Early Neutral Evaluation Sanctions issue to the undersigned magistrate
judge to handle all sanctions issues in a single order.

1 removed this action on April 3, 2024. (ECF No. 1). The case was then scheduled for an Early
2 Neutral Evaluation set to take place on July 9, 2024 in front of Judge Couvillier. (ECF No. 7).
3 Plaintiff's counsel withdrew their representation of her on June 20, 2024. (ECF No. 24).

4 On July 3, 2024, Judge Couvillier entered a minute order noting that Plaintiff had failed to
5 submit her confidential settlement statement. (ECF No. 28). As a result, Judge Couvillier
6 vacated the July 9, 2024 Early Neutral Evaluation and converted it to a status hearing. (*Id.*).
7 Plaintiff did not appear for the status hearing. (ECF No. 29). But later that evening, Plaintiff
8 emailed Defendant's counsel regarding her discovery responses and explained the following:

9 Currently, I'm with child and expecting my delivery very soon. I
10 do apologize for my lateness but my child will be delivered very
11 soon. It was a happy surprise as I didn't find out until later on
which is why I've been unavailable.

12 I do need an extension on the interrogatories and to seek counsel.
13 Can we extend this until the end of October if possible?

14 Again, I apologize for my late response but I'm at the doctor most
of the time with the baby being due soon.

15 Please do let me know if we can extend it and I'll put you in touch
16 with my new counsel once I have obtained legal representation.

17 (ECF No. 38-3 at 3).

18 Because Plaintiff did not appear at the July 9, 2024 status conference, Judge Couvillier
19 entered an order for Plaintiff to appear at a hearing on August 8, 2024 to show cause why
20 sanctions should not issue. (ECF No. 30). A few hours before the hearing, Plaintiff responded to
21 an email from Defendant providing her with Defendant's notice of non-opposition that it filed
22 related to Defendant's motion to extend time (ECF Nos. 32, 33). (ECF No. 36-3 at 2). In her
23 email, Plaintiff stated:

24 I see the motion was filed without mention of me being pregnant
25 and having a C-Section which is not allowing me to show up in court
today.

26 The motion reads as if I'm evading the court when in fact I was a
27 High Risk Pregnancy. Nor do I have clearance from my doctor to
28 do anything but heal for the next 6-8 weeks.

1 Please advise and amend the motion to include my reasoning of why
 2 I am unable to show up in court due to my child's birth. Also, my
 3 new council [sic] hasn't been assigned yet but I'll put them in touch
 4 with you once it is finalized.

5 Again, I'm not ignoring you but I'm healing from a serious surgery
 6 to get my child delivered safely along with assigning new council
 7 [sic].

8 (ECF No. 36-3 at 2).²

9 Plaintiff failed to appear at the show cause hearing. (ECF No. 35). Judge Couvillier thus
 10 found sanctions to be appropriate and ordered Defendant to file a brief regarding Federal Rule of
 11 Civil Procedure 16(f) sanctions in response to Plaintiff's non-compliance with the settlement
 12 conference orders and process. (*Id.*). Defendant filed that brief, requesting case terminating or
 13 monetary sanctions under Federal Rules of Civil Procedure 16(f) and 37(b)(2)(A)(vii), on August
 14 29, 2024. (ECF No. 36). Plaintiff did not respond to that brief. (ECF No. 37).

15 On September 16, 2024, Defendant filed a motion to extend time, seeking to extend
 16 discovery deadlines by sixty days due to Plaintiff's failure to respond to Defendant's discovery
 17 requests. (ECF No. 38). Defendant also moved for case terminating sanctions or to compel
 18 Plaintiff to respond to its discovery requests under Federal Rule of Civil Procedure 37 for
 19 Plaintiff's failure to respond to Defendant's discovery requests. (ECF No. 39). Plaintiff did not
 20 respond to either motion. (ECF Nos. 40, 41).

21 **II. Sanctions.**

22 Defendant moves for case terminating or monetary sanctions under Federal Rules of Civil
 23 Procedure 16(f) and 37(b)(2)(A)(vii) for Plaintiff's failure to attend the Early Neutral Evaluation
 24 and for Plaintiff's failure to obey the Court's orders related to that Early Neutral Evaluation.
 25 (ECF No. 36). Defendant also moves for case terminating sanctions or to compel Plaintiff to
 26 respond to discovery under Federal Rule of Civil Procedure 37 for Plaintiff's failure to respond to
 27 Defendant's discovery requests. (ECF No. 39).

28 ² Other than these two emails, Defendant explains that Plaintiff has not responded to its counsel's
 other emails and has not answered Defendant's counsel's phone calls. (ECF No. 39-3).

1 The rules governing Defendant’s brief regarding Plaintiff’s failure to appear at the Early
2 Neutral Evaluation provide as follows. Federal Rule of Civil Procedure 16(f) provides that a
3 court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii) if a party
4 fails to appear at a pretrial conference or fails to obey a scheduling or other pretrial order. Fed. R.
5 Civ. P. 16(f)(1)(A), (C). One of the sanctions available under Rule 37(b)(2)(A) is dismissing the
6 action. Fed. R. Civ. P. 37(b)(2)(A)(v). Federal Rule of Civil Procedure 16 also provides that,
7 instead of or in addition to any other sanction, the Court must order the party to pay the
8 reasonable fees—including the attorneys’ fees—incurred because of any noncompliance with the
9 rule, unless the noncompliance was substantially justified or other circumstances make an award
10 of expenses unjust. Fed. R. Civ. P. 16(f)(2). Federal Rule of Civil Procedure 37(b)(2)(A)(vii)
11 provides that a court may issue the sanction of “treating as contempt of court the failure to obey
12 any order except an order to submit to a physical or mental examination.”

13 The rules governing Defendant’s motion for sanctions related to Plaintiff’s failure to
14 respond to discovery requests provide as follows. Federal Rule of Civil Procedure 37(a) allows a
15 party to move for an order compelling disclosure or discovery. Federal Rule of Civil Procedure
16 37(a)(5)(A) provides that, if the motion is granted, the court must, after giving an opportunity to
17 be heard, require the party whose conduct necessitated the motion to pay the movant’s reasonable
18 expenses incurred in making the motion, including attorneys’ fees. However, under Federal Rule
19 of Civil Procedure 37(a)(5)(A)(i)-(iii), the court must not order the payment if the movant filed
20 the motion before attempting in good faith to obtain the disclosure or discovery without court
21 action; the opposing party’s nondisclosure, response, or objection was substantially justified; or
22 other circumstances make an award of expenses unjust.

23 The district court has discretion to enter discovery sanctions under Rule 37. *See Payne v.*
24 *Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). However, that discretion is narrowed where the
25 drastic sanction of dismissal is imposed. *Id.* If the district court enters dismissal sanctions, the
26 losing party’s noncompliance must have been due to willfulness, fault, or bad faith. *Id.* The
27 Ninth Circuit has identified five factors that a district court must consider before dismissing a
28 case as a sanction: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s

1 need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy
2 favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions.
3 *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997); *Stars' Desert Inn Hotel & Country*
4 *Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997).

5 Here, the Court finds that sanctions are warranted, but that there are less drastic sanctions
6 than case terminating sanctions available. Plaintiff's failure to prepare an Early Neutral
7 Evaluation statement, failure to appear at the status conference, failure to appear at the show
8 cause hearing, and failure to comply with her discovery obligations warrant a sanctions analysis
9 under Federal Rules of Civil Procedure 16 and 37. Similarly, her failure to respond to
10 Defendant's motions constitute her consent to the Court granting them under Local Rule 7-2(d).
11 The question before the Court thus becomes what sanctions are warranted.

12 Defendant has sought two forms of sanctions: (1) its attorneys' fees and costs; and (2) and
13 case terminating sanctions or an order compelling Plaintiff to respond to Defendant's discovery
14 requests. Regarding the first sanction—attorneys' fees and costs—the Court must consider
15 whether Plaintiff's noncompliance was substantially justified or other circumstances make an
16 award of expenses unjust. *See* Fed. R. Civ. P. 16(f)(2); *see* Fed. R. Civ. P. 37(a)(5)(A); *see* Fed.
17 R. Civ. P. 37(b)(2)(C). However, because Plaintiff has not responded to any of Defendant's
18 filings, the Court is without the ability to determine whether the imposition of sanctions would be
19 unjust or whether Plaintiff's failures to participate in this case are substantially justified. This is
20 particularly true given Plaintiff's two emails to Defendant's counsel. So, the Court will order
21 Plaintiff to show cause in writing why the Court should not impose monetary sanctions in the
22 form of Defendants' attorneys' fees and costs.

23 Regarding the second sanction—dismissal or allowing the case to move forward and
24 compelling Plaintiff to respond to Defendant's discovery requests—the Court must consider the
25 five factors outlined by the Ninth Circuit. The first factor weighs in favor of dismissal because
26 this case has stalled due to Plaintiff's failure to engage in the Early Neutral Evaluation process
27 and the discovery process. The second factor also weighs in favor of dismissal because of the
28 Court's involvement in this case that Plaintiff's absence has necessitated. The third factor weighs

1 in favor of dismissal because Defendant has been prejudiced by continually participating in this
2 case without reciprocity from Plaintiff. Defendant has expended attorneys' fees in participating
3 in the status conference, the show cause hearing, and sanctions briefings necessitated by
4 Plaintiff's failure to engage in this case. And Defendant cannot properly defend against
5 Plaintiff's allegations if Plaintiff refuses to engage in discovery. The fourth factor weighs against
6 dismissal because, if this Court were to dismiss Plaintiff's case, it would deprive her of the ability
7 to pursue it on the merits.

8 Ultimately, however, the fifth factor is determinative here. Although Defendant seeks
9 case terminating sanctions, it also briefed the availability of an order compelling Plaintiff to
10 respond to its discovery requests as an alternative sanction for Plaintiff's failure to respond to
11 discovery. (ECF No. 39 at 17-19). Defendant explains: "if the Court is not inclined to dismiss
12 the action presently at a minimum the Court should: (1) compel Plaintiff to immediately respond
13 to Hilton's written discovery requests that have been pending for four (4) months; (2) impose
14 monetary sanctions in the form of Hilton's attorneys' fees and costs; and (3) issue an Order to
15 Show Cause why case terminating sanctions should not be imposed for Plaintiff's extreme
16 discovery violations." (*Id.* at 19). The Court thus finds that lesser sanctions are available and that
17 they are warranted here, where the Court has no input from Plaintiff. This is particularly true
18 because it appears from Plaintiff's emails that she may have a legitimate reason for failing to
19 fulfil her obligations in this case. The Court will thus refrain from imposing case terminating
20 sanctions at this time and will order Plaintiff to respond to Defendant's discovery requests. The
21 Court will further order Plaintiff to show cause in writing why the Court should not impose case
22 terminating sanctions for her failure to abide by the Court's orders regarding the Early Neutral
23 Evaluation and failure to attend the status conference and show cause hearing regarding that Early
24 Neutral Evaluation.

25 **III. Extension of time.**

26 Defendant moves to extend the current discovery deadlines by sixty days. (ECF No. 38).
27 Defendant explains that an extension is necessary because of Plaintiff's failure to engage in
28 discovery. Plaintiff did not respond to Defendant's motion, constituting her consent to the Court

granting it. *See* LR 7-2(d). The Court finds that Defendant has shown good cause to extend discovery and grants the motion.

IT IS THEREFORE ORDERED that Defendant's motion to extend time (ECF No. 38) is **granted**. The following deadlines shall govern discovery:

Expert disclosures:	December 6, 2024
Rebuttal expert disclosures:	January 7, 2025
Discovery cutoff:	February 4, 2025
Dispositive motions:	March 7, 2025
Pretrial order:	April 7, 2025 ³

IT IS FURTHER ORDERED that Defendant's motion for sanctions (ECF No. 39) is **granted in part and denied in part**. It is granted in part regarding Defendant's request that the Court compel Plaintiff to respond to Defendant's discovery requests and show cause why the Court should not recommend terminating sanctions. It is denied in part regarding Defendant's request that the Court dismiss the case.

IT IS FURTHER ORDERED that on or before **November 15, 2024**, Plaintiff must do the following:

- (1) show cause in writing by filing a response to this order on the docket explaining why the Court should not dismiss Plaintiff's case for her failure to comply with her Early Neutral Evaluation obligations;
- (2) show cause in writing by filing a response to this order on the docket explaining why the Court should not order Plaintiff to pay Defendant's attorneys' fees and costs incurred in preparing for and attending the Early Neutral Evaluation status conference, attending the order to show cause hearing, and preparing the motion to compel briefing; and

³ Under Local Rule 26-1(b)(5), if dispositive motions are filed, the deadline for filing the joint pretrial order will be suspended until thirty days after decision on the dispositive motions or further court order.

1 (3) serve upon Defendant her responses to Defendant's interrogatories and requests for
2 production of documents.

3 **Plaintiff is advised that if she fails to comply with this order, the Court may**
4 **recommend dismissal of this case.**

5 **IT IS FURTHER ORDERED** that the Clerk of Court is kindly directed to send Plaintiff
6 a copy of this order.

7
8 DATED: October 17, 2024

A handwritten signature in blue ink, appearing to read 'D. Albregts', is written over a horizontal line.

DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE